87-1438

Supreme Court, U.S.
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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

J. K. AND SUSIE L. WADLEY RESEARCH INSTITUTE & BLOOD BANK d/b/a THE BLOOD BANK AT WADLEY, *Petitioner*

v.

THE HONORABLE SAM HOUSTON, *Respondent*

Petition for Writ of Certiorari to the Court of Appeals for the Second Appellate District of Texas

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QUESTION PRESENTED

1. Whether the identities, medical records, and health status of voluntary blood donors are constitutionally protected by the right of privacy from discovery in state tort litigation?

LIST OF PARTIES

The parties to the mandamus proceeding below were the Petitioner, J. K. and Susie L. Wadley Research Institute and Blood Bank, d/b/a The Blood Center at Wadley, and Respondent, The Honorable Sam Houston, Judge of the 211th Judicial District Court of Denton County, Texas. This case arises out of the discovery process in an ongoing state court action, styled and numbered, "Patty Jo Baker, et al. v. David H. Ammons, et al.," No. 86-2728-C, pending in the 211th Judicial District Court, wherein the parties in interest are Patty Jo Baker, individually and as representative of the Estate of George W. Baker, Ellis Lee Baker, and Georgia Ellen Baker Slough. Petitioner J. K. and Susie L. Wadley Research Institute and Blood Bank, d/b/a The Blood Center at Wadley, is a defendant in this cause. The other defendants include David H. Ammons, M.D., P.A., Lewisville Memorial Hospital, Inc., and Gulf Coast Regional Blood Center.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

J. K. AND SUSIE L. WADLEY RESEARCH INSTITUTE & BLOOD BANK d/b/a THE BLOOD BANK AT WADLEY, *Petitioner*

v.

THE HONORABLE SAM HOUSTON, *Respondent*

Petition for Writ of Certiorari to the Court of Appeals for the Second Appellate District of Texas

Petitioner respectfully prays that a writ of certiorari issue to review the decision and judgment of the Court of Appeals for the Second Appellate District of Texas entered in the above-entitled proceeding on September 10, 1987.

OPINION BELOW

The opinion of the Court of Appeals tersely stated that in view of the court's opinion in *Tarrant County Hospital District v. Hughes*, 734 S.W.2d 675 (Tex. App. – Fort Worth 1987) (en banc), the court was of the opinion that the petition for mandamus filed by Petitioner should be denied. A Petition for Certiorari, numbered 87-1082, has

been filed in *Hughes* and is presently pending before this Court. (Appendix at A-9.)

The Supreme Court of Texas has declined to exercise its jurisdiction to review this decision by denying Petitioner's Motion for Leave to File Writ of Mandamus therein. The notices received from the Clerk of the Texas Supreme Court reflecting these actions are reprinted in the appendix to this petition. (Appendix at A-10 and A-12.)

The orders of the 211th District Court of Denton County, Texas, are not reported. Each of the orders at issue are reprinted in the appendix to this petition. (Appendix at A-1 through A-7.)

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3). Although the state court litigation has not been decided on the merits, the federal questions presented herein have been finally determined in the mandamus proceeding; moreover, the state court review of this federal issue will not be possible and will not be affected by the ultimate outcome of the underlying tort case. Therefore, this case is final within the meaning of 28 U.S.C. § 1257(3). *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 481 (1975); *New York v. Quarles*, 467 U.S. 649, 651 n. 1 (1984).

Mandamus is the appropriate state law remedy to correct an abuse of discretion by the trial court in the discovery process; indeed, it is the only available method of review in cases involving privileges. *Crane v. Tunks*, 160 Tex. 182, 328 S.W.2d 434, 439-41 (1959); *Maresco v.*

Marks, 362 S.W.2d 299, 301 (Tex. 1962). This Court has attached finality for purposes of 28 U.S.C. § 1257 to state court judgments denying a writ of mandamus. *Pacific Coast Dairy v. Department of Agriculture*, 318 U.S. 285 (1943).

The Supreme Court of Texas has declined to exercise its jurisdiction in this proceeding. Thus, the reviewable judgment involved in this matter is that previously rendered by the intermediate Texas Court of Appeals. *Interstate Circuit, Inc. v. Dallas*, 390 U.S. 676, 678 n. 1 (1968); *Michigan-Wisconsin Pipe Line Co. v. Calvert*, 347 U.S. 157, 160 (1954).

Petitioner, as custodian of the identities and medical records in question, is entitled to assert the concomitant rights of the third-party blood donors whose constitutionally protected right to privacy would be "diluted or adversely affected" if Petitioner's constitutional challenge should fail and their identities, medical records, and health status be disclosed pursuant to the trial court's discovery order. *Carey v. Population Services International*, 431 U.S. 678, 684 (1977); *Craig v. Boren*, 429 U.S. 190, 196 (1976).

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

Amendment XIV, Section 1, of the United States Constitution:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of

citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Suit was brought in this case by Patty Jo Baker, individually and as representative of the Estate of George W. Baker, Ellis Lee Baker, and Georgia Ellen Baker Slough in the 211th Judicial District Court of Denton County, Texas, Cause No. 86-2728-C, against David H. Ammons, M.D., P.A., Lewisville Memorial Hospital, Inc., J. K. and Susie L. Wadley Research Institute & Blood Bank, d/b/a The Blood Center at Wadley, and Gulf Coast Regional Blood Center. The suit alleged in part that the deceased, George W. Baker, contracted Acquired Immune Deficiency Syndrome (AIDS) as a result of blood transfusions received at the hospital.

Plaintiffs filed extensive pretrial discovery requests seeking the identities, test results, and other available medical information about all of the blood donors whose blood had been used in the health care of the deceased. Petitioner timely filed objections to the discovery requests and a Motion for Protective Order under Tex. R. Civ. P. 166b. Petitioner urged that the discovery sought would violate the donor's rights of privacy under the Texas and United States' Constitutions, that the information was protected under the physician-patient privilege, and that disclosure would have a devastating impact on the ability to maintain a volunteer blood supply program.

A lengthy evidentiary hearing, an in camera inspection of documents, and an additional hearing for arguments on the law were conducted by the trial court. Eventually, the trial court entered two orders holding that the information sought did not violate the constitutional right of privacy or the physician-patient privilege. (Appendix at A-1 through A-7.) The court also held that the disclosure did not sufficiently threaten the institutional and societal interests in maintaining an effective volunteer blood donation system.

Petitioner filed a Petition for Writ of Mandamus with the Court of Appeals for the Second Appellate District of Texas, sitting in Fort Worth, Texas, on May 18, 1987, seeking relief from the trial court's orders. Leave was initially granted to file the petition by the Court of Appeals on May 21, 1987. The case was submitted for oral argument on June 18, 1987. The Court of Appeals entered a judgment on September 10, 1987, holding that the petition should be denied as improvidently granted. (Appendix at A-8.) The court's opinion briefly stated that its decision was based on *Tarrant County Hospital District v. Hughes*, 734 S.W.2d 675 (Tex. App. – Fort Worth 1987) (en banc) (writ pending in United States Supreme Court; cause number 87-1082). (Appendix at A-9.)

On November 6, 1987, Petitioner filed a Petition for Writ of Mandamus with the Texas Supreme Court. Leave to file the petition was denied by the Court on November 23, 1987. (Appendix at A-10.) Petitioner's Motion for Rehearing was denied on January 6, 1988. (Appendix at A-12.)

HOW THE FEDERAL QUESTION WAS PRESENTED

Petitioner urged that the requested and ordered discovery was violative of the donors' rights of privacy under the United States Constitution at every available stage of the legal proceedings, in the primary state tort case and also the ancillary, original mandamus actions in both the Court of Appeals and the Texas Supreme Court. Both appellate courts refused to exercise jurisdiction.

The Court of Appeals rejected the constitutional privacy points of Petitioner on the basis of its earlier decision in *Tarrant County Hospital District v. Hughes*, 734 S.W.2d 675 (Tex. App. – Fort Worth 1987) (en banc). By refusing to exercise its jurisdiction, the Texas Supreme Court allowed the Court of Appeals' decision to stand.

REASONS FOR GRANTING THE WRIT

I.

DECISION CONFLICTS WITH THE DECISIONS OF THE HIGHEST COURTS OF OTHER STATES ON A SUBSTANTIAL CONSTITUTIONAL ISSUE.

This Court has not resolved whether the federal right of privacy bars discovery of the identities and medical records of volunteer blood donors in civil tort litigation. The decision of the Texas Court of Appeals in the case *sub judice* conflicts with the decisions of two states' highest courts.

A. Florida

In *South Florida Blood Services, Inc. v. Rasmussen*, 500 So.2d 533, 537 (Fla. 1987), the Florida Supreme

Court held that disclosure of the identities of volunteer blood donors would violate constitutionally protected privacy interests under both the Federal and state Constitutions. The court recognized that more was involved than simply the discovery of names because the plaintiff would have to establish that one or more of the blood donors had "AIDS or was in a high risk group." *Id.*

The *Rasmussen* court noted that resulting additional investigation and discovery would necessarily lead to questioning of the donors, their co-workers, friends, employers, and others as to the donor's "sexual preference, drug use, or general life-style." *Id.* The court reasoned:

> The threat posed by the disclosure of the donor's identities goes far beyond the immediate discomfort occasioned by third parties probing into sensitive areas of the donor's lives. Disclosure of donor identities in any context involving AIDS could be extremely disruptive and even devastating to the individual donor. If the requested information is released, and petitioner queries the donor's friends and fellow employees, it will be functionally impossible to prevent occasional references to AIDS.

Id. The court noted: "'AIDS is the modern day equivalent of leprosy. AIDS, or a suspicion of AIDS, can lead to discrimination in employment, housing and even medical treatment.'" *Id.* The court added that "by the very nature of the case, disclosure of donor identities is 'disclosure in a damaging context.'" *Id.* (quoting *Lora v. Board of Education of City of New York*, 74 F.R.D. 565, 580 (1977)). Thus, the court concluded that disclosure of the donors would violate their rights of privacy. *Id.*

The court in *Rasmussen* recognized that the disclosure of donor information also impacts society as whole. More particularly, the court emphasized that "[s]ociety has a vital interest in maintaining a strong volunteer blood supply, a task that has become more difficult with the emergence of AIDS." *Id.* The court reasoned:

> Because there is little doubt that inquiry into one's private life and potential association with AIDS will deter blood donation, we conclude that society's interest in a strong healthy blood supply will be furthered by the denial of discovery in this case.

Id. at 538. The court in *Rasmussen* concluded:

> The probative value of the discovery sought is dubious at best. The potential of significant harm to most, if not all, of the fifty-one unsuspecting donors in permitting such a fishing expedition is great and far outweighs the plaintiff's need under these circumstances.

Id.

B. Iowa

The decision of the Texas Court of Appeals is also in direct conflict with the decision of the Iowa Supreme Court in *Head v. Colloton*, 311 N.W.2d 870 (Iowa 1983). In that case, the court barred discovery of a blood platelet donor's identity under the Iowa Open Records Act. The court rejected arguments that the privacy rights of donors are somehow different from more typical "patients." *Id.* at 876. The court held that an "individual's interest in avoiding disclosure of personal matters is constitutionally based." *Id.* (citing *Whalen v. Roe*, 429 U.S.

589 (1977)). The court noted that a "valuable part of the right of privacy is the right to avoid publicity concerning private facts." *Id.* The court concluded that this is a right that is just as important to "a potential donor as to a person in ill health." *Id.*

C. Texas Law

The Texas Court of Appeals held that the extant case was governed by its decision in *Tarrant County Hospital District v. Hughes*, 734 S.W.2d 675 (Tex. App. – Fort Worth 1987) (en banc), in which the court expressly rejected the rule in *Rasmussen*. In *Hughes*, the court held:

> We disagree with the opinions of the Florida courts and hold that the trial court order compelling relator to identify blood donors is not an impermissible violation of their rights to privacy. We further hold that relator has not established a societal interest that overrides the plaintiff's right to discovery of the blood donor's identities.

Id. at 679. *See also Gulf Coast Regional Blood Center v. Houston*, No. 2-87-233-CV, slip op. (Tex. App. – Fort Worth, Feb. 11, 1988). The court's application of the balancing test under *Nixon v. Administrator of General Services*, 433 U.S. 425 (1977), was directly contrary to that of the Florida Supreme Court in *Rasmussen* and that of the Iowa Supreme Court in *Head*. Further, the court's suggestion that the discovery order could provide adequate safeguards against improper disclosure was directly contrary to *Rasmussen* and *Head*. *Id.* at 679-80.

The scope of the discovery ordered in the present case far exceeds that involved in *Hughes*, *Head* and *Rasmus-*

sen. The information ordered to be discovered includes in part the following:

(1) the names and addresses of the donors;

(2) information as to whether they are alive or dead;

(3) the test results of any donor known to have tested positive for AIDS at any time;

(4) any information received from any other individual or entity that even suggests a positive AIDS test.[1]

(Exhibit "B" to Writ of Mandamus at 3-5; *see also* Exhibit V to Petition.) The court clearly held that the plaintiffs' attorneys would be allowed to contact the donors. (*Id.* at 4-5.) Thus, the court's first order requires disclosure of both the identities of the donors as well as medical records expressly dealing with AIDS testing or other information pertaining to whether any of the donors have AIDS. This order clearly requires disclosure of personal medical information. Moreover, as noted in *Rasmussen*, it requires disclosure in a damaging context.

The trial court's second order, compelling answers to interrogatories and requests for production, set forth no "restrictions" on the use or scope of disclosure of the information in question. This information includes: (1) the results of investigation or reports about

[1]This aspect of the court's order is particularly harmful. The national blood bank system has attempted to encourage physicians and other health care providers to provide the blood banks with health information about donors to aid the blood banks in "looking back" to ferret out potential dangers that may have developed in the blood system prior to the development of reliable and medically-accepted AIDs test. The cooperation of physicians and health care providers will obviously be discouraged if disclosure is required.

donors possibly having AIDS (Appendix A-2, ¶B); (2) communications from anyone regarding the donor (Appendix A-3, ¶2); (3) any and all documents pertaining to any investigations, tracing or reporting about the donors (*Id.*); and (4) documents pertaining to whether any of the donors have been placed on an unsuitable donor list. (*Id.*)

Importantly, the record in the present case included extensive testimony establishing not only the impact of the ordered discovery on the individual donors, but also the impact on society's interest in a viable volunteer blood system. Again, the nature of the record in this case makes the conflict between the decision of the Texas Court of Appeals in this case and the decisions of the highest courts in Florida and Iowa even more clear.

As *Rasmussen* recognized, the discovery and trial process in a civil case are incapable of providing adequate assurance that damaging personal information will not be disclosed. The order of the trial court in this case compels disclosure to the Plaintiffs' attorneys. Investigation and further discovery cannot be conducted in a vacuum. The trial cannot be conducted in a vacuum. Indeed, despite the diligent efforts of all concerned in this case, a portion of the *in camera* documents was inextricably exposed in the court clerk's file for this case. This is just the type of vice inherent in allowing discovery of such highly personal matters in a civil suit.

The very fact that the donors will be forced to answer deposition questions about their sexual activities, possible drug use, and the status of their health in the presence of two sets of attorneys and a court reporter shows

that even the discovery permitted under the court's first order will invade the privacy of the donors. The additional discovery permitted under the second order without restriction even more clearly violates the privacy of the donors.

The right of privacy is "the right to be let alone – the most comprehensive of rights and the right most valued by civilized men." *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting). The decision of the Texas Court of Appeals, in contrast to *Head* and *Rasmussen*, sacrifices the donors' rights to privacy to provide marginally useful discovery to litigants in a civil case, with the accompanying detrimental impact on the viability of the volunteer blood system.

II.

THE TEXAS COURT OF APPEALS INCORRECTLY INTERPRETED THE DECISIONS OF THIS COURT.

The court in *Hughes* relied heavily upon *Whalen v. Roe*, 429 U.S. 589, 598-600 (1977) in reaching its decision. The Texas Court of Appeals interpreted *Whalen* as allowing disclosure of medical records and related information where "safeguards" are provided. *Hughes*, 734 S.W.2d at 679. The court concluded that "judicial" discovery safeguards are sufficient under *Whalen* to allow disclosure of matters admittedly subject to the right of privacy. *Id.* This extension of *Whalen* is not supported by either the decision in *Whalen* or the record in the present case.

Whalen dealt with disclosure to a state regulatory body pursuant to statutory and regulatory provisions

that set forth complete protection against public disclosure. 429 U.S. at 599-602. There was a strong state interest in obtaining disclosure in *Whalen*. That case involved attempts of a state agency to obtain a list of names and prescribed drugs for the purpose of regulating the abuse of the most dangerous legitimate prescription drugs. *Id.*

In the present case, the party seeking disclosure is a civil litigant in a topical and high profile suit for damages, not a state agency charged with the duty to look out for both public and private interests. Here, the interest of the state is on the other side of the equation. The interest of society in a viable volunteer blood system supports the denial of disclosure. In addition, the information sought in this case, in contrast to *Whalen*, is more personal and intimate with more severe repercussions resulting from disclosure.

The decision in *Hughes* not only simplistically misapplies and extends *Whalen* to a totally different factual situation, but it also fails to properly interpret and apply the balancing test set forth by this Court in *Nixon v. Administrator of General Services*, 433 U.S. 425 (1977). This test requires the weighing of the state's interest in disclosure against the privacy interests of the volunteer blood donors and the societal interests of the public in the maintenance of the volunteer blood supply system. The test requires the court to balance:

(1) the importance of the state's interest in disclosure;

(2) the degree or extent to which denial of disclosure would impact the state's interest;

(3) the importance of the donor's and society's interests in preventing disclosure; and

(4) the degree or extent to which disclosure would impact on the donor's and society's interests.

First, the litigant's interest is in being able to develop evidence to support a suit for compensation. The interest of the donor is the constitutional right to privacy, the right to be left alone. Society's interest is in maintaining the blood system and fostering the health care interests of the general public.

Second, the term "restriction" as applied to the present case is an oxymoron. The fact is that disclosure to the Plaintiffs' attorneys is, at a minimum, being required. There is no restriction in this respect. Moreover, the trial court's "restrictions" merely stated that disclosure to third parties would be allowed "upon further order. . . ." (Appendix at A-4.) The trial court made clear that this would not prevent further discovery. Indeed, the trial court also made clear that the use of general information about the health status of the donors for purposes of further investigation would be allowed.[2]

[2]As already noted, a portion of the *in camera* documents, dealing with health-status information, was inadvertently left in the general file in the District Court and was later seen by one of the plaintiffs' attorneys. The trial court refused to bar use of this information by the Plaintiffs in further investigation. The trial court expressly refused to find the information was subject to the court's first order, the only order in any way inhibiting use of the privileged information. (Appendix at A-1 to A-4.) The Court of Appeals granted an injunction barring any such use until the privacy/privilege issues were fully litigated and reviewed. *J. K. and Susie L. Wadley Research Institute and Blood Bank d/b/a The Blood Center at Wadley*, No. 2-87-159-CV (Tex. App. – Fort Worth, July 23, 1987) (unpublished per Tex. R. App. P. 90(e)).

Also, as noted above, the trial court's second order included no restrictions on the use of interrogatory answers and document production dealing with the following matters: (1) the results of investigation or reports about donors possibly having AIDS (Appendix A-2, ¶B); (2) communications from anyone regarding the donor (Appendix A-3, ¶2); (3) any and all documents pertaining to any investigations, tracing or reporting about the donors (*Id.*); and (4) documents pertaining to whether any of the donors have been placed on an unsuitable donor list. (*Id.*)

Third, the denial of disclosure would amount to a limited imposition on the ability of the litigant to prove its case. The impact of disclosure on the lives and reputations of the donors would be catastrophic. The use of judicial "safeguards," in light of the severity of impact of disclosure and the inherent ineffectiveness of such safeguards, does not alter the balance. Moreover, it does nothing to address the devastating impact on the volunteer blood system.

Hughes misapplied the balancing test. The court gave too much weight to the right of a single litigant to conduct discovery. The court gave too much weight to the "restrictions" ordered by the trial court. The court failed to recognize that the state's own interest in allowing parties to obtain compensation is outweighed by its fundamental responsibility to look after the general public health, safety and welfare of its citizens. The Court of Appeals gave too little weight to the privacy of the donors and the interest of the public in a volunteer blood system.

III.

SUPREME COURT PRECEDENT IS NEEDED TO RESOLVE THE ARISING CONFLICTS ON THIS SUBSTANTIAL FEDERAL QUESTION.

AIDS is the most significant public health issue in our society today. The number of civil suits involving AIDS is drastically increasing as each day passes. ACLU, *AIDS And The Law / Sexuality And The Law: Legal Docket* (July 1987). Despite the general paucity of written opinions on state discovery issues, it is very apparent that there is significant conflict already developing with respect to the issues in the present case. The general balancing test by itself provides insufficient guidance. A constitutional precedent is needed to provide uniform treatment of the substantial federal constitutional privacy issues involved in AIDS discovery cases.

Even the Texas courts have not treated these issues with uniformity. In *Herman v. Sigmund*, No. 87-5809-I (pending in the 162nd Jud. Dist. Ct., Dallas County, Texas), the trial court refused to allow discovery virtually identical to that ordered in the case *sub judice*. This decision is in obvious conflict with the attempt to apply *Hughes* to the present matter. *See also Shelvin v. Lykos*, 741 S.W.2d 178 (Tex. App. – Houston [1st Dist.] 1987, no writ) (refusing to allow disclosure, on authority of Tex. Rev. Civ. Stat. Ann. art. 445(d) (Vernon's Supp. 1987), of test results of a state inmate with AIDS to anyone having recently had sexual contact with the inmate).

In addition to *Rasmussen* and *Head*, several other state courts have addressed the AIDS discovery/privacy issues involved in the present case. In *Taylor v. Central*

Blood Bank, No. 6087-00206, the Court of Common Pleas, Allegheny County, Pennsylvania, on August 12, 1987, ruled that a blood bank is not required to disclose the identity of an HIV-positive donor whose blood was transfused during open heart surgery to a man who subsequently tested positive for AIDS. The court in *Taylor* expressly held that the disclosure of the donor's name would have a "chilling effect . . . on the ability of the blood bank to obtain a sufficient supply of blood from voluntary donors." The court noted that public health officials have testified before Congress that "people would be very reluctant to give blood if there was a possibility that the results of any testing would be provided to third parties without the donor's approval, if donors may be named as parties to lawsuits, or if the donation of blood involved them in any litigation." The court noted that the confidentiality of test results is intertwined "with the larger policy of the confidentiality of AIDS testing in general." The court concluded that denial of discovery of the identity of the donor would not "significantly interfere with the plaintiffs' ability to present its best case against the blood bank."

Similarly, in *Krygier v. Airweld, Inc.*, 520 N.Y.S.2d 475 (N.Y. Sup. Ct. 1987), the Supreme Court for King's County, New York, refused to require the New York Blood Center to disclose the names and addresses of blood donors. The plaintiff in that case alleged that the blood provided to her deceased husband was infected with the AIDS virus. *Id.* The court reasoned that the statutory physician-patient privilege under New York law was a sufficient basis to protect the constitutional privacy interests of the donors. *Id.* The *Krygier* court

noted that the purpose of the physician-patient privilege is to "protect the privacy of patients and prevent their exposure to embarrassment." *Id.* The court added:

> [S]ociety has a substantial interest in fostering the free flow of information between physician and patient in order to insure proper diagnosis and treatment . . . the court believes this rationale is certainly applicable to the relationship between a blood donor and the blood bank. This is particularly true when the blood donor, who altruistically donated his or her blood, is exposed to embarrassment and innuendo based upon a person acquiring AIDS from the pool of donations.

Id.

The court in *Krygier* noted that even if the physician-patient privilege were inapplicable, the balancing of competing interests favored the granting of the protective order. *Id.* The court stated:

> The moving party persuasively argues that in order to disclose names and addresses of blood donors who were not parties to this action would violate the donors' constitutional rights of privacy . . . The donors' right of privacy together with society's interest in maintaining the free flow of volunteer blood far outweighed the plaintiff's right to disclosure of all evidence material and necessary to the prosecution of her suit. Besides, the utility of the names and addresses of donors is marginal.

Id.

The very next day after *Krygier* was decided, a completely contrary decision was rendered in *Glessner v. Blood Center of Southeastern Wisconsin*, No. 740-451,

by the Circuit Court for Milwaukee County, Wisconsin. The court in *Glessner*, like the Texas court in the present case, refused to follow *Rasmussen* or *Head*. Thus, the court allowed discovery of blood donor identities. *See also Tri-State Publishing Co. v. Port Jervis*, ___ N.Y.S. 2d ___ (N.Y. Sup. Ct. 1988).

Constitutional precedent is essential to halt the balkanization of state court treatment of the federal constitutional privacy issues presented in civil discovery in AIDS cases such as the present. The blood banks are a nationwide operation. A blood donor's freedom from intrusive questioning and disclosure of the most intimate details of his life should not depend upon which state the donor chooses as his place of residence or where his blood is sent. Under the present state of the law, a donor who gives blood in one state would be protected under the Federal Constitution if his blood were sent to Florida, but his personal life would be subject to exposure and scrutiny if he lived in Texas. The constitutional right to privacy of the donors and the vital national interests in a viable volunteer blood system should not be subject to such irrational uncertainty.

CONCLUSION

For the reasons heretofore stated and discussed it is respectfully submitted that a substantial question with respect to the constitutional right to privacy is presented by this petition and that the privacy interests of the individual blood donors, as well as the national interests in a viable volunteer blood system, compel the granting of a writ of certiorari in this cause.

Respectfully submitted,

COWLES & THOMPSON
Michael W. Huddleston
Counsel of Record
R. Brent Cooper
4000 First RepublicBank Plaza
901 Main Street
Dallas, Texas 75202
(214) 670-1100

Attorneys for Petitioner

IN THE DISTRICT COURT
DENTON COUNTY, TEXAS
211TH JUDICIAL DISTRICT

Cause No. 86-2728-C

PATTY JO BAKER, Individually and as Representative of the Estate of GEORGE W. BAKER, ELLIS LEE BAKER AND GEORGIA ELLEN BAKER SLOUGH, *Plaintiffs*

vs.

DAVID H. AMMONS, M.D., P.A., LEWISVILLE MEMORIAL HOSPITAL, INC., J. K. AND SUSIE L. WADLEY RESEARCH INSTITUTES AND BLOOD BANK D/B/A THE BLOOD CENTER AT WADLEY, AND GULF COAST REGIONAL BLOOD CENTER, *Defendants*

ORDER

On March 27, 1987, counsel for Plaintiffs and Defendants appeared for a hearing on Plaintiffs' Motion to Compel and on Defendant's, J. K. and Susie L. Wadley Research Institutes and Blood Bank, d/b/a The Blood Center at Wadley, Motion for Protective Order. The Court thereupon considered the argument of the parties and case authorities submitted since the date of the hearing. Upon hearing the evidence, the Court finds that Plaintiffs' Motion to Compel should be sustained in part and Defendants' Motion for Protective Order should be overruled.

IT IS THEREFORE ORDERED as follows:

A. Defendants' Motion for Protective Order is overruled. Defendants Wadley and Gulf Coast have admitted that the donors are persons with knowledge of relevant facts in this case pursuant to Rule 166b3, Texas Rules of Civil Procedure. Further, in regard to test results on the donors' blood, the definition of "patient" is not sufficiently broad to include a "donor" under the Physician-patient privileges and immunities afforded by Texas Rule of Evidence 509. It is further found that the disclosure of the identity and address of the blood donors does not violate the constitutional right to privacy, nor does such disclosure sufficiently threaten institutional and society interests in maintaining a healthy and effective volunteer blood donation program to warrant an order prohibiting the discovery.

B. That Defendant Wadley disclose the names, addresses, life or death status, test results and all documents reflecting same of any donor of blood to the decedent Baker that is known by Wadley to have AIDS. ("AIDS is defined to mean antibody positive, ARC, or having AIDS. This definition applies throughout this Order.)

C. Wadley shall disclose the names, addresses, life or death status, test results and all documents reflecting same of any donor of blood to the decedent Baker whose AIDS status is unknown or not available to Wadley.

D. Wadley shall disclose any other information from any individual or entity that Wadley believes knows the AIDS status of any of the donors donating blood to the decedent Baker.

E. At this time, Wadley does not have to give identifying information on any donors Wadley tested for AIDS with negative results. However, Wadley shall supply those test results and all documents pertaining to these donors by number to Plaintiffs' attorneys.

F. The above information and documents shall be submitted to the Court for in camera review before disclosure to Plaintiffs' attorneys.

In complying with this Order, the following orders shall apply:

1. The names and locations of the donors and test results on their blood shall be sealed with the Court and a number shall be assigned to each donor for reference during discovery unless otherwise ordered by the Court.

2. Documents containing identities of the donors shall be filed with the Court and sealed. Only parties' counsel will have access to these sealed documents.

3. The list of names of the donors shall be destroyed at the final disposition of the case, unless otherwise ordered by this Court.

4. Only the counsel of parties to this suit will have access to the names and locations of the above donors and blood test results. Plaintiffs are prohibited from disclosing the donors names or locations, either directly or indirectly, to third parties, without further order of this Court.

5. No party, their agents or representatives, shall directly or indirectly contact any "donor" identified through records produced under this Order nor under-

take further discovery regarding such "donors" until permitted to do so by further order of this Court.

6. The information and production of documents ordered shall be made by May 11, 1987, or if appealed, within 10 days of the date of affirmance.

SIGNED, ORDER AND RENDERED this 24th day of April, 1987.

/s/ Sam Houston
Judge Presiding

IN THE DISTRICT COURT
DENTON COUNTY, TEXAS
211TH JUDICIAL DISTRICT

No. 86-2728-C

PATTY JO BAKER, Individually and as Representative of the Estate of GEORGE W. BAKER, ELLIS LEE BAKER AND GEORGIA BAKER ALLEN BAKER SLOUGH, *Plaintiffs*

vs.

DAVID H. AMMONS, M.D., P.A., LEWISVILLE MEMORIAL HOSPITAL, INC., J. K. AND SUSIE L. WADLEY RESEARCH INSTITUTES AND BLOOD BANK D/B/A THE BLOOD CENTER AT WADLEY, AND GULF COAST REGIONAL BLOOD CENTER, *Defendants*

ORDER

On April 30, 1987, counsel for Plaintiffs and Defendant, J. K. and Susie L. Wadley Research Institutes and Blood Bank, d/b/a The Blood Center at Wadley ("Wadley"), appeared for a hearing on Plaintiffs' Motion to Compel. The Court thereupon considered the argument of the parties and, upon hearing the evidence, the Court finds that Plaintiffs' Motion to Compel should be sustained in part.

IT IS THEREFORE ORDERED as follows:

A. Defendants' Motion for Protective Order is overruled. Defendants, Wadley and Gulf Coast, have admitted that the donors are persons with knowledge of rele-

vant facts in this case pursuant to Rule 166b3, Texas Rules of Civil Procedure. Further, in regard to test results on the donors' blood, the definition of "patient" is not sufficiently broad to include a "donor" under the physician-patient privileges and immunities afforded by Texas Rule of Evidence 509. It is further found that the disclosure of the identity and address of the blood donors does not violate the constitutional right to privacy, nor does such a disclosure sufficiently threaten institutional and society interests in maintaining a healthy and effective volunteer blood donation program to warrant an order prohibiting the discovery.

B. Defendant Wadley is ordered to Answer Plaintiffs' Interrogatories 9, 10 and 5 (Number 5 by giving the location of the mobile sites).

C. (1) That Defendant Wadley produce documents responsive to the following Plaintiffs' request (all documents from 1980 to 1986 are to be produced unless otherwise noted) 16, 18, 65, 66, 81, 83, 84, 87, 89, 90, 91, 92.

(2) Defendant Wadley is ordered to produce a representative sample of photographs taken from the years 1980 to 1984 under Plaintiffs' Request for Production No. 20. Upon Plaintiffs' production of a list of video and cassette tapes, Wadley has agreed to produce the tapes requested by Plaintiffs in such list.

(3) Defendant Wadley is ordered to produce a representative sample of its printed advertisements on paper for the years 1980 through 1982. Defendant Wadley to the best of its ability is to produce *all* printed advertisements on paper for the years 1983 and 1984 in response to Plaintiffs' Request for Production No. 31.

(4) In response to Plaintiffs' Request for Production 50, 52, 54, 59, 60, 62, 63, and 64, Defendant Wadley is ordered to produce for the years 1980 through 1986 to all Requests any documents relating in any way to AIDS or hepatitis and any documents reflecting any infraction in the collecting, testing, dispensing, screening, or storage of blood or blood products.

(5) For the years 1980 through 1986, Defendant Wadley is ordered to produce documents under Plaintiffs' Request for Production No. 80. Wadley is to produce two copies, one copy which is to be given Plaintiffs may have information which does not relate to AIDS, hepatitis, testing, collecting, dispensing, screening, or storage of blood, excised from the document. Defendant Wadley is to produce an unexcised copy of those same documents to the Court.

(6) For the years 1980 through 1985, Defendant Wadley is ordered to produce the documents under Plaintiffs' Request No. 96.

On documents or answers claimed to be privileged by Defendant Wadley, Wadley is ordered to produce said documents according to this Court's order or institute mandamus proceedings by May 11, 1986. Defendant Wadley is further ordered to produce any and all other documents under this Order to Plaintiffs on May 26, 1987.

SIGNED, ORDERED AND RENDERED this 14th day of May, 1987.

/s/ Sam Houston
Judge Presiding

IN THE COURT OF APPEALS FOR THE
SECOND APPELLATE DISTRICT OF TEXAS

No. 2-87-104-CV

WADLEY RESEARCH INSTITUTES,
d/b/a THE BLOOD CENTER AT WADLEY, *Relator*

vs.

HONORABLE SAM HOUSTON, Judge, *Respondent*

OPINION PER CURIAM (NFP)
September 10, 1987

JUDGMENT

On this day came on to be considered the Relator's Petition for Writ of Mandamus filed by Wadley Research Institutes, d/b/a The Blood Center at Wadley. Said Petition for Writ of Mandamus was filed by leave of Court on May 21, 1987, and the same having been duly considered, it is the opinion of this Court that the Petition should be denied as improvidently granted. It is therefore ordered that the Petition for Writ of Mandamus be and the same is hereby denied.

It is further ordered that Relator pay all costs incurred by reason of this proceeding.

IN THE COURT OF APPEALS FOR THE
SECOND APPELLATE DISTRICT OF TEXAS

No. 2-87-104-CV

WADLEY RESEARCH INSTITUTES,
d/b/a THE BLOOD CENTER AT WADLEY,
Appellants

vs.

HONORABLE SAM HOUSTON, *Appellee*

ORIGINAL PROCEEDING

OPINION

In view of this court's opinion in *Tarrant County Hospital District v. Hughes*, No. 2-86-231-CV (Tex. App.–Fort Worth Aug. 12, 1987) (not yet reported), we dismiss relator's petition for writ of mandamus, based on our finding that leave to file was improvidently granted.

PER CURIAM

SUPREME COURT OF TEXAS
P.O. Box 12248
Supreme Court Building
Austin, Texas 78711
Mary M. Wakefield, Clerk

November 23, 1987

Mr. Michael W. Huddleston
Cowles & Thompson
4000 First RepublicBank Plaza
901 Main Street
Dallas, Texas 75202

Mr. A. W. Arnold, III
Ms. Susan Jones
Mr. Gregory N. Woods
Mr. Cecil W. Casterline
Shank, Irwin & Conant
4100 Thanksgiving Tower
1601 Elm Street
Dallas, Texas 75201

RE: Case No. C-6959

STYLE: J. K. AND SUSIE L. WADLEY RESEARCH INSTITUTES AND BLOOD BANK
v.
THE HONORABLE SAM HOUSTON, JUDGE ET AL.

Dear Counsel:

Today, the Supreme Court of Texas overruled relator's motion for leave to file petition for writ of mandamus in the above styled case.

Respectfully yours,

Mary M. Wakefield, Clerk

/s/ Barry E. Pickett
Deputy

cc.

Honorable Sam Houston
Judge, 211 District Court
Carroll Courts Building
Denton, Texas 76201

SUPREME COURT OF TEXAS
P.O. Box 12248
Supreme Court Building
Austin, Texas 78711
Mary M. Wakefield, Clerk

January 6, 1987

Mr. Michael W. Huddleston
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Dallas, Texas 75201

RE: Case No. C-6959

STYLE: J. K. AND SUSIE L. WADLEY RESEARCH INSTITUTES AND BLOOD BANK
v.
THE HONORABLE SAM HOUSTON, JUDGE ET AL.

Dear Counsel:

Today, the Supreme Court of Texas overruled relator's motion for rehearing of motion for leave to file mandamus in the above referenced case. (Chief Justice Phillips not sitting).

Respectfully yours,

Mary M. Wakefield, Clerk
/s/ Blanca E. Morin, Deputy

cc.

Honorable Sam Houston
Judge, 211 District Court
Carroll Courts Building
Denton, Texas 76201